

services by multiple service providers over a single wire will not occur until the next century.

Therefore, since only one distributor can use common wiring at any time, *someone* must deploy *additional* common wiring before competition to provide video, data, and other services to individual subscriber units can be realized. Forcing the incumbent cable operator to relinquish control over the common wiring that it has installed would not facilitate or encourage the deployment of this second set of wiring. To the contrary, such a policy would *diminish* the likelihood of facilities-based competition within the building.

Where the building owner has the legal right to restrict access to its premises, forcing cable operators to cede ownership and control of the common wiring in the building will do nothing to enhance the ability of individual residents to choose from among competitive distributors. Only the building's owner will have the right to choose, to the exclusion of subscribers in an MDU, and this right will only serve to increase the leverage of the building owner in negotiating rights to be the sole provider of service in the MDU. And where the building owner, as the result of state or local "access-to-premises" laws, does not have the legal right to deny competitive access, transferring control of common wiring to the owner (and perhaps ultimately to a competitor) will effectively negate the effects of such laws by reducing the likelihood that a second set of common wiring will be deployed.

If the building owner turns the cable operator's wiring over to a new provider, the cable operator may have the *legal* right to install its own new wiring and continue to provide service. But what incentive does it have to do so, if the building owner retains the right to

expropriate the wiring for use by yet another competitor? And if the incumbent cable operator is allowed to continue using its initially installed wiring, what incentive does a second provider have to build a second facility within the building if that facility can then be turned over for the possible exclusive use of a third competitor? A LEC or a second cable operator would be more likely to incur the costs and risks of installing a second facility if it had the assurance that it would be able to use and control the facility for as long as it wished — rather than for as long as the building owner wished.

Currently, both cable operators and telephone companies are upgrading their facilities to compete with each other and are deploying fiber-based, switched broadband facilities nationwide. Indeed, the core purpose of the 1996 Act was to encourage such facilities-based competition. There is no reason to believe that telephone companies lack the resources or the incentive to supplement the copper wiring in MDUs with upgraded broadband facilities. Therefore, the Commission's rules should clearly be aimed at encouraging — not discouraging — such facilities-based competition. Further, the convergence of telecommunications and video services not only increases the competitive advantages of multiple broadband facilities within MDUs; it also makes the deployment of such multiple facilities entirely feasible and likely.

On the other hand, there is also no doubt that telephone companies and other competitors would prefer to be allowed simply to expropriate the use of the existing broadband facilities installed in MDUs by cable operators. This not only would enable them to save the costs of upgrading their own facilities but also would protect them from

competition in the provision of telephony, video, and data services. In contrast, facilities-based competition would give subscribers the ability to mix and match telephone, video, and data services from the telephone company and the cable operator. Allowing the telephone company to use the single broadband facility installed by the cable operator to provide video programming, data, and/or telephony would not only remove the prospect of competition among video service providers, but also would eliminate the prospect that the sole video provider might compete with the telephone company in the provision of telecommunications services — precisely opposite to the outcome envisioned by Congress.<sup>30/</sup>

These anticompetitive effects would be compounded if the building *owner* rather than the occupant were allowed to control and determine the user of unit-dedicated wiring, or if *common* wiring were under the control of the building owner, or if the building owner had the right under local law to *restrict the access* of competing providers to the building's occupants. In all those circumstances, the building owner could effectively thwart any prospect of facilities-based competition — or, indeed, of any competition at all for individual occupants. Therefore, the building owner, as the "gatekeeper," would be the only party to benefit.

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<sup>30/</sup> Moreover, if a competitor could take over the plant of the pre-existing video provider, a video provider should be able to exert control over the facilities of the pre-existing voice provider — but it is evident that this does not enhance facilities-based competition either.

**D. The Commission Can Achieve Regulatory Parity by Using the Existing Cable Demarcation Point for all Broadband Wiring.**

One of the Commission's goals in this proceeding is to establish rules that accommodate the entry of telephone companies and cable operators into each others businesses.<sup>31/</sup> As explained above, it would be premature to change the existing rules applicable to cable and telephone wiring because convergence is not imminent. However, as telephone companies upgrade their facilities to add broadband capabilities, the Commission can achieve its goal of parity by regulating telephone company broadband wiring under the same rules which are now applicable to cable wiring because that would encourage facilities-based competition.

By subjecting similar broadband facilities to the same rules, the Commission can avoid the confusion and any legal concerns of subjecting existing cable and telephone wiring to a new set of rules. At the same time, the Commission can ensure that no service provider has an artificial competitive advantage because it is subject to a different set of wiring rules than its competitors.

**IV. THE COMMISSION SHOULD APPLY ITS SIGNAL LEAKAGE AND TECHNICAL STANDARDS TO ALL VIDEO PROGRAMMING DISTRIBUTORS THAT UTILIZE BROADBAND FACILITIES.**

The Commission's *Notice* seeks comment on the problems that may result when new broadband common carrier services are delivered over aeronautical and public safety frequencies at power levels sufficient to cause potential interference. *Notice* ¶¶ 24-25.

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<sup>31/</sup> See *Notice* ¶¶ 2-5.

Specifically, the Commission seeks comment on how best to extend its signal leakage limits and frequency offset requirements to facilities other than cable. The Commission also seeks comment on whether its signal quality standards should be extended to other video providers, or whether a competitive market for video programming delivery services will ensure that quality signals are delivered to subscribers. For the reasons set forth below, the Commission should apply the cable television technical standards to all video service providers.

The Commission is tasked with regulating the manner in which cable and telephone wiring is maintained. Currently, cable facilities carry video signals over frequencies within aeronautical bands. These frequencies must be offset to prevent interference with radio communications and navigation equipment, and the Commission has adopted strict signal leakage standards to prevent cable service from interfering with other services that utilize the same spectra. The Commission's regulations also govern the quality of the signal delivered to subscribers, which can be affected by sub-standard or low-quality cable, improper maintenance, the extent of signal splitting, the ingress into a cable system of unwanted signals as a by-product of controlling signal egress, and other factors.<sup>32/</sup> The Commission's technical standards serve to ensure that cable subscribers receive an acceptable quality of video signal. Because the same technical standard issues are relevant to the provision of service by all video service providers, the same rules should be applicable.

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<sup>32/</sup> See 47 C.F.R. §§ 76.605(a), 76.610-.617 (1994); *Notice of Proposed Rulemaking*, 6 FCC Rcd 3673 (1991).

**A. Signal Leakage Standards.**

Video systems employ closed cable delivery systems which are not intended to radiate frequencies over-the-air. Thus, video providers like cable television systems and authorized over-the-air users that operate in the same vicinity may operate on the same frequencies. However, cable systems must meet stringent Commission technical standards to ensure that their use of frequencies over coaxial cable will not interfere with over-the-air licensed services operating on the same frequencies. Excessive radiation leakage from video systems operating on frequencies in the "midband" and "superband" ranges can cause interference to over-the-air radio communications on frequencies utilized by safety and emergency services.<sup>33/</sup> The Commission repeatedly has expressed its concern over the danger to life and property caused by cable systems emitting excessive radiation which also jeopardizes the Commission's goal of maintaining compatibility between frequency usage by video systems and various co-located services.<sup>34/</sup> Therefore, in order to protect against harmful interference to emergency and safety communications through the use of aeronautical frequencies by co-located spectrum users, the cable technical standards should be applied to alternate video providers.

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<sup>33/</sup> The frequency bands which are allocated for cable system aeronauticals are 108-136 MHz and 225-400 MHz. These overlap the aeronautical and marine emergency frequencies 121.5 MHz, 156.8 MHz and 243 MHz.

<sup>34/</sup> See generally, *Second Report and Order*, 99 F.C.C.2d 512 (1984), *recon. denied* 100 F.C.C.2d 115 (1985); *Further Notice of Proposed Rule Making*, 76 F.C.C.2d 311 (1980); 65 F.C.C.2d 813 (1977).

The public safety interest and other policy goals that underlie the Commission's signal leakage criteria and technical standards are equally relevant to any video service providers that use aeronautical and navigational frequencies.<sup>35/</sup> Clearly, the marketplace will provide no guarantee that the public safety will be protected.

**B. Technical Standards.**

Cable operators have been required to follow Commission standards governing signal quality since 1972.<sup>36/</sup> These standards ensure that signal reception provides subscribers enjoyable viewing with only slightly perceptible impairments. 47 C.F.R. § 76.605. The Commission determined that the public interest is served when viewers can receive high quality video signals. These standards also promote efficiencies by reducing subscriber complaints and service calls to cure signal quality problems. These standards also maintain a degree of technical uniformity nationwide but allow sufficient flexibility for further technical change.<sup>37/</sup> These efficiencies would be lost if differing technical standards caused operators to customize services or equipment.<sup>38/</sup> Therefore, to serve the public interest, the same technical standards should be applied to other broadband video signal providers.

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<sup>35/</sup> Moreover, as a general rule, cable operators will be placed at a competitive advantage if they must incur costs to comply with these technical standards while their competitors are not subject to the same requirements.

<sup>36/</sup> *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972) *aff'd*, 523 F.2d 1344 (1975), *aff'd*, 79 F.C.C.2d 663 (1980).

<sup>37/</sup> *Id.* at 198-204.

<sup>38/</sup> *Notice of Proposed Rulemaking*, 6 FCC Rcd 3673.

Thus, the Commission should require that providers' services which use the same bandwidth be subject not only to the same rules regarding the disposition of inside wiring upon termination of service but also to the same criterion regarding wiring — including signal leakage and technical standards.

**V. THE COMMISSION SHOULD PROHIBIT EXCLUSIVE AGREEMENTS WITH MDUS.**

A principal impediment to competition within MDUs is the building owner's ability to control access to its premises. Building owners often have an interest in granting *exclusive* rights to a single distributor in their MDUs. In return for any economies of scale (and/or market power) that exclusivity might convey to the distributor,<sup>39/</sup> the owner can extract a premium price which may *exceed* the combined value of access to two competitive providers. Moreover, wholly apart from any premium that they may recover from distributors in return for exclusivity, building owners may have other reasons to want to own or control the single wire into the building. The deployment of additional wiring would be inconvenient to the owner, while providing him with few, if any, counterbalancing benefits. The occupant of the individual unit, however, would benefit by having a choice of providers.<sup>40/</sup>

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<sup>39/</sup> The primary cost savings are those of deploying new facilities by other providers.

<sup>40/</sup> In some respects, building owners resemble local franchising authorities who, prior to the enactment of the 1984 Cable Act and 1992 Cable Act, typically refused to grant more than one cable franchise. These franchising authorities attempted to justify their *de facto* exclusive franchising by asserting an interest in preventing undue disruption to their streets and public rights of way. By doing so, they were able to extract concessions and payments in return for a franchise. See *Preferred Communications, Inc. v. City of Los Angeles*, 754 (continued...)



To encourage and preserve facilities-based competition in the telecommunications marketplace and facilitate competition in the provision of video, data and telephone services, it is essential that service providers not be permitted to enter into exclusive agreements with landlords. The Commission has jurisdiction under the Communications Act to regulate such contracts through its broad authority over communications services under the Communications Act.<sup>41/</sup> The Commission may also preempt state laws that permit such contracts if they interfere with federal policies.<sup>42/</sup> The policy which led Congress to prohibit exclusive franchises in the 1992 Cable Act supports a limitation on exclusive contracts in the provision of telecommunications services to MDUs.<sup>43/</sup>

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<sup>40/</sup> (...continued)

F.2d 1396, 1400-01 (9th Cir. 1985), *aff'd and remanded*, 476 U.S. 488 (1986).

<sup>41/</sup> The Commission has broad authority over the provision of "all interstate . . . communication by wire or radio" and such authority extends to cable service. 47 U.S.C. § 152(a) (1988); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

<sup>42/</sup> *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

<sup>43/</sup> This position is consistent with the position of at least one telephone company. In its Response to Petitions for Reconsideration ("Bell Atlantic Response"), Bell Atlantic argued that the Commission should "expressly bar cable operators from entering into long term exclusive contracts with the owners or managers of MDUs." Bell Atlantic Response at 6. While the Commission questioned that such a requirement is necessary to promote competition, stating that "the current record does not contain sufficient evidence to bear out this assertion," *First Recon. Order* at 20 n.81, it is axiomatic that exclusive contracts with MDUs would prohibit alternate services providers from even offering the prospect of facilities-based competition in the delivery of services to MDU subscribers. Though wireless competitors may be able to offer alternate services to MDU subscribers, the 1996 Act expressed a need to encourage *facilities-based* competition over competing networks. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 147-48 (1996). Facilities-based competition cannot be realized in the face of exclusive service agreements between service providers and MDU owners.

**VI. STATE LAW SHOULD GOVERN CONTROL OF PLANT IN A LOOP-THROUGH WIRED MDU.**

In its initial cable home wiring proceeding and on reconsideration of its initial order, the Commission determined that it would be impractical to apply its wiring regulations to loop-through wiring configurations.<sup>44/</sup> The preferred method cable operators use to wire MDUs is non-loop-through wiring. Existing MDUs with loop-through wiring configurations negotiated contracts to provide service over such wiring, and these contracts were governed by then applicable laws. Because federal law did not and still does not dictate the manner in which existing loop-through wiring is regulated, state law should continue to govern.

The technical and practical issues relating to the regulation of non-loop-through wiring are more complex and relate, for example, to the appropriate demarcation point, disposition of wiring upon termination of service, and the use of wiring by competing service providers. However, because the demarcation point for loop-through wiring must lie at a point prior to the first subscriber's unit, the ownership and disposition of wiring, which are relevant considerations in non-loop through configurations, are not at issue in loop-through configurations. The party who owns the wiring upon termination of service by one subscriber in a loop is largely irrelevant, because no competing service provider would be able to use the wiring to or in that subscriber's unit without interfering with the service to all

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<sup>44/</sup> *Cable Home Wiring Order*, 8 FCC Rcd at 1437; *First Recon. Order* ¶ 36. In a loop-through wiring configuration, a single cable is used to provide service to multiple subscribers in an MDU. Therefore, the service that the first subscriber in the "loop" receives dictates the service to all other subscribers in the loop.

other subscribers. If the service contract did not specify the owner of the wiring (*e.g.*, the MDU owner or the cable operator<sup>45/</sup>), state law likely would.

The Commission is accepting comment in its *Further Notice* on the narrow issue of whether MDU owners should be permitted to purchase loop-through cable home wiring where all subscribers on a loop simultaneously elect to switch to an alternate service provider. *Further Notice* ¶ 40. The Commission also seeks comment on whether it should apply the same rules regarding compensation and technical standards to loop-through wiring that it applies to non-loop-through wiring, and where it should designate the demarcation point in loop-through MDUs. *Id.*

Cox does not believe that the Commission should consider regulations specifically to permit MDU owners to purchase loop-through wiring, including where all subscribers on a loop simultaneously elect to switch to an alternate provider. These regulations would be impractical at best, would disrupt the relationship between the landlord and the service provider, and would retard facilities-based competition. In condominiums, cooperatives, and other MDUs in which individual housing units are owned by the subscribers, decisions regarding the ownership of common wiring already are delegated to a MDU organization, such as a condominium board. In rented units with loop-through wiring configurations, the MDU owner or the cable operator by contract maintains control over the wiring, rather than the individual subscriber. Cable operators and building owners should continue to be able to

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<sup>45/</sup> It is not practical for the subscriber to own loop-through wiring because it could not be used by a competing provider on a subscriber-by-subscriber basis.

negotiate for ownership of this wiring if it is not already covered by state law. It would be impractical and disruptive to relations among service providers, landlords, and their tenants to settle the rights in cable plant through a vote of building residents even if such a proposal did not conflict with state realty laws or the preexisting contractual rights of the building owner or the existing service provider. Competing service providers should have the right, however, to provide facilities-based competition either through a loop-through or non-loop through configuration in such buildings. Imposing federal regulation of such matters is unnecessary and may affect existing contracts between tenants and landlords, or unit owners and condominium or cooperative groups if special arrangements have been made at the time the subscriber moved into the MDU.

**VII. IN THE ABSENCE OF A COMPETITIVE ENVIRONMENT FOR SECURED CPE, CONTINUED REGULATION OF CABLE EQUIPMENT IS REASONABLE.**

The Commission envisions a time when "the technologies used to deliver and receive cable and telephone service may become more similar" and when subscribers will receive telephony and video programming services "using a single piece of equipment, such as a computer, modem or a videophone" and will "only need one piece of CPE to interact with both services. . . ." <sup>46/</sup> It therefore seeks in this proceeding to begin harmonizing its rules for telephone and cable CPE, and proposes the same form of interconnection and retail availability of cable CPE as currently is mandated for telephone CPE.

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<sup>46/</sup> Notice ¶ 69.

But this position does not reflect current technology. Cable and telephone technology have not yet converged, and the function of telephone CPE is different than cable CPE. Telephone CPE is merely a vehicle to access the dialtone and other services. Cable CPE, in contrast, is used by cable operators to select programming and services. Cable CPE also is used by cable operators to ensure that customers receive only those services that they have chosen to purchase. Set-top box devices, for example, can be configured to allow customers to receive premium services to which they subscribe. Because of the difference in function, cable CPE raises security issues that do not exist in the telephone context.<sup>47/</sup>

In addition, cable CPE may be instrumental in fulfilling the new statutory mandate to block fully the audio and video of programming that subscribers not only have chosen to purchase but object to receiving.<sup>48/</sup>

The Commission should not adopt regulations governing cable CPE in this proceeding. CPE issues are separable from the main wiring issues in the *Notice* and *Further Notice*. Any attempt to open the market for cable CPE that raises security issues, such as descramblers, must be preceded by an in-depth study of the industry and the marketplace to determine whether deregulation will ensure the integrity and safety of cable systems. Such a study is required under the 1996 Act, mandating that the Commission adopt regulations governing navigation devices — regulations which may not "jeopardize security for multi-

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<sup>47/</sup> While the Commission uses the term "CPE" to include televisions and video cassette recorders, such devices do not allow subscribers to receive special services, such as premium and pay-per-view services and therefore generally do not raise security issues.

<sup>48/</sup> 1996 Act, §§ 504, 505 (Communications Act, §§ 640, 641).

channel video programming and other services . . . or impede the legal rights of a provider of such services to prevent theft of service."<sup>49/</sup>

In conducting the review required by the 1996 Act, the Commission should, indeed, seek to understand how cable and telephone technologies and CPE are likely to evolve and converge. But it should not lose sight of the fact that, for now, the technologies for cable and telephone CPE are different in form and function, and there is no reason to expect, given these differences, that they should be subject to identical regulatory frameworks.

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<sup>49/</sup> 1996 Act, § 304 (Communications Act, § 629).

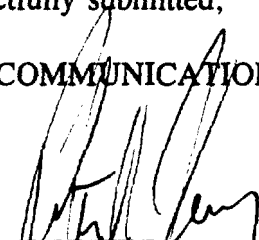
**VIII. CONCLUSION.**

Accordingly, for the reasons set forth above, the Commission should adopt regulations concerning cable and telephone wiring consistent with the discussion herein.

Respectfully submitted,

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